

John and Rita Dalessio, The Dalessio Family (2003) Trust
16 Via Las Encinas. Carmel Valley, CA 93924: Tel. No. 831-659-7046
In Pro Per

FILED

MAY 14 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COMMONWEALTH ANNUITY AND
LIFE INSURANCE COMPANY f/k/a/
ALLMERICA FINANCIAL LIFE
INSURANCE AND ANNUITY a Delaware
corporation,

NO. CV 08 1739

(Contract)

Plaintiff,

ANSWER TO

COMPLAINT AND

v.

COUNTERCLAIM

JOHN DALESSIO: RITA DALESSIO and the
DALESSIO FAMILY (2003) TRUST

JURY

Defendants.

DEMANDED

JOHN DALESSIO: RITA DALESSIO and the
DALESSIO FAMILY (2003) TRUST

Counterclaimants,

v.

COMMONWEALTH ANNUITY AND LIFE
INSURANCE COMPANY f/k/a/ ALLMERICA
FINANCIAL LIFE INSURANCE AND

ANNUIITY COMPANY a Delaware corporation, and DAVID SHANE, an individual, and VAUGHN R. WALKER, an individual, and ANN SPARKMAN, an individual and Does 1 through 20.

Counterdefendants.)

As and for its Answer to the Complaint on file herein, Defendants John DALESSIO, Rita DALESSIO and the DALESSIO Family (2003) Trust (hereinafter,

As and for its Answer to the Complaint on file herein, Defendants John DALESSIO, Rita DALESSIO and the DALESSIO Family (2003) Trust (hereinafter collectively, “DALESSIO”) admit, deny and allege as follows:

FIRST DEFENSE

1. DALESSIO is without knowledge and information and therefore denies the allegations of Paragraph 1 of the Complaint. Henceforth, a denial on that basis shall be described as a “denial for lack of information or belief.”

2. DALESSIO admits that JOHN DALESSIO and RITA DALESSIO are husband and wife and denies the truth of the other allegations of Paragraph 2 of the Complaint.

3. DALESSIO admits the allegations of Paragraph 3 of the Complaint.

4. DALESSIO admits that Plaintiff’s venue is predicated on 28 U.S.C. Section 1391(a) and (c). Except as expressly admitted, DALESSIO denies the allegations of Paragraph 4 of the Complaint.

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2 5. DALESSIO denies for lack of information and belief the allegations of
3 Paragraph 5 of the Complaint.
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5 6. JOHN DALESSIO admits the allegations of Paragraph 6 of the Complaint.
6 RITA DALESSIO and THE DALESSIO FAMILY (2003) (DFT 03) deny for lack of
7 information and belief the allegations of Paragraph 6 of the Complaint.
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9 7. Answering Paragraph 7 of the Complaint, DALESSIO admits that in June,
10 2006, a verdict was entered in the above referenced action against JOHN DALESSIO. RITA
11 DALESSIO and the DFT 03 this allegation, as they were neither parties to this action nor to
12 the settlement agreement. In July, this verdict was subject to a Motion for New Trial, Motion
13 to Amend Clerk's Judgment, Motion to Stay Clerk's Judgment, Motion for Relief under
14 FRCP Rule 60 and Motion for Relief under Rule 50(b) all filed on behalf of JOHN
15 DALESSIO. The Court never ruled on any of these Motions.
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18 8. Answering Paragraph 8 of the Complaint, DALESSIO admits that in May,
19 2006, a judgment was entered in the above referenced action against JOHN DALESSIO. In
20 July, this verdict was subject to a Motion for New Trial, Motion to Amend Clerk's
21 Judgment, Motion to Stay Clerk's Judgment, Motion for Relief under FRCP Rule 60 and
22 Motion for Relief under Rule 50(b) all filed on behalf of JOHN DALESSIO. The Court
23 never ruled on any of these Motions.
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26 9. Answering Paragraph 9 of the Complaint, JOHN DALESSIO admits that he
27 entered into a settlement agreement with ALLMERICA Financial Life Insurance and
28 Annuity Company (ALLMERICA). RITA DALESSIO and the DFT 03 deny this allegation,
29 as they were neither parties to this action nor to the settlement agreement. The settlement
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1
2 agreement provided that JOHN DALESSIO denied any liability in connection with any
3 claim, and entered into the settlement agreement solely to avoid litigation and buy peace. To
4 satisfy the terms and conditions of Section 6: Nature of Settlement, ALLMERICA was
5 required to dismiss its cause of action against John DALESSIO. ALLMERICA did not fulfill
6 this requirement.
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10 10. JOHN DALESSIO admits the allegations of Paragraph 10 of the Complaint.
11 RITA DALESSIO and the DFT 03 deny this allegation, as they were neither parties to this
12 action nor to the settlement agreement.
13

14 11. Answering Paragraph 11 of the Complaint, JOHN DALESSIO admits that the
15 settlement provided for the payments as stated, but alleges that said payments were
16 contingent upon ALLMERICA dismissing its complaint for fraud against JOHN
17 DALESSIO. ALLMERICA never dismissed its complaint, which has remained since June,
18 2006 as the only negative entry against JOHN DALESSIO'S seventy year reputation for
19 honesty and truthfulness. RITA DALESSIO and the DFT 03 deny this allegation, as they
20 were neither parties to this action nor to the settlement agreement.
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25 12. Answering Paragraph 12 of the Complaint, JOHN DALESSIO admits that the
26 Settlement Agreement provided that failure to pay the sums agreed upon would subject
27 JOHN DALESSIO to certain penalties and attorney fees, but alleges that said payments were
28 contingent upon ALLMERICA dismissing its complaint for fraud against JOHN
29 DALESSIO, and that the penalties in the settlement agreement violated the laws of
30 California. ALLMERICA never dismissed its complaint, which has remained as a judgment
31 for fraud against JOHN DALESSIO'S reputation since June, 2006. Except as expressly
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1 admitted or alleged, DALESSIO denies the allegations of Paragraph 12. RITA DALESSIO
2
3 and the DFT 03 deny this allegation, as they were neither parties to this action nor to the
4
5 settlement agreement.

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7 13. Answering Paragraph 13 of the Complaint, DALESSIO admits that the
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9 language set forth in paragraph 13 of the Complaint has been copied from the settlement
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11 agreement, but alleges that said payments were contingent upon ALLMERICA dismissing
12
13 its complaint for fraud against JOHN DALESSIO. ALLMERICA never dismissed its
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15 complaint, which has remained as a judgment for fraud against JOHN DALESSIO'S
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17 reputation since June, 2006. DALESSIO further alleges that ALLMERICA breached the
18
19 terms of the agreement by its failure to perfect its "settle and release" agreement and
20
21 expunge its claims against DALESSIO. Except as expressly admitted or alleged,
22
23 DALESSIO denies the allegations of Paragraph 13.

24
25 14. DALESSIO denies the allegations of Paragraph 14 of the Complaint.

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28 SECOND DEFENSE

29
30 (no claim stated)

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32 15. The Complaint, and each count alleged therein, fails to state a claim upon which
33
34 relief can be granted.

THIRD DEFENSE

(waiver and release)

16. In November, 2006, ALLMERICA entered into an agreement with DALESSIO,
releasing all claims by ALLMERICA against JOHN DALESSIO, but DALESSIO alleges
that said payments were contingent upon ALLMERICA dismissing its complaint for fraud
against JOHN DALESSIO. ALLMERICA never dismissed its complaint, which has

1
2 remained as a judgment for fraud against JOHN DALESSIO'S reputation since June,
3 2006.and therefore Plaintiff's Complaint is barred by the doctrines of waiver and release.
4

5 FOURTH DEFENSE

6 (fraudulent inducement)

7 17. In entering into initial discussions with DALESSIO, and thereafter, Plaintiff
8 ALLMERICA failed to disclose that it did not intend to dismiss its complaint against
9 DALESSIO. This information was not public and was unknown to DALESSIO. The
10 information was important information which would have substantially affected the
11 settlement decisions under consideration by DALESSIO and, in particular, would have
12 caused DALESSIO to pursue his numerous causes on appeal. ALLMERICA owed a duty to
13 DALESSIO, to disclose such information, and ALLMERICA'S failure to disclose is a
14 breach of that duty. ALLMERICA'S failure to disclose such information also constitutes
15 fraud in the inducement of the settlement entered into between the parties. As a
16 consequence, defendant DALESSIO is excused from any and all performance under
17 agreements proposed or made between the parties.
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24 FIFTH DEFENSE

25 (mistake)

26 18. Any claim that DALESSIO was obligated to pay damages to ALLMERICA is
27 barred by the doctrine of mistake, in that DALESSIO and ALLMERICA were mistaken as to
28 the fact that ALLMERICA was to release its fraud claim against DALESSIO at the time the
29 alleged settlement was allegedly formed.
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33 SIXTH DEFENSE

34 (failure of consideration)

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2 19. ALLMERICA failed to give the required consideration for the settlement
3 obligations alleged in the Complaint, in that ALLMERICA failed to dismiss, settle and
4 release its fraud complaint against DALESSIO. ALLMERICA'S performance was a
5 material element of the settlement, a condition precedent to DALESSIO'S performance, and
6 partial consideration for DALESSIO'S performance. Therefore DALESSIO'S performance
7 on the agreement alleged in the Complaint is excused due to failure of consideration.
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11 SEVENTH DEFENSE

12 (nonoccurrence of a condition precedent)

13 20. DALESSIO incorporates herein the allegations of Paragraph 19 of this Answer.
14

15 21. DALESSIO'S performance on the agreement alleged in the Complaint is
16 excused due to the nonoccurrence of a condition precedent.
17

18 EIGHTH DEFENSE

19 (material breach)

20 22. DALESSIO incorporates herein the allegations of Paragraph 19 of this Answer.
21

22 23. DALESSIO'S performance on the agreement alleged in the Complaint is
23 excused due to the material breach by ALLMERICA of that agreement.
24

25 NINTH DEFENSE

26 (statute of limitations)

27 24. All claims in the complaint are barred by the applicable statutes of limitation.
28

29 TENTH DEFENSE

30 (setoff)

31 25. DALESSIO has claims against ALLMERICA as set forth in the counterclaims
32 asserted hereinbelow, and the amounts due and owing to DALESSIO for damages on such
33 counterclaims reduce or eliminate any liability of DALESSIO to ALLMERICA under the
34 claims asserted in the Complaint, by the doctrine of setoff..

1 WHEREFORE, defendant DALESSIO prays as set forth hereinbelow.
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3 * * * * *

4
5 COUNTERCLAIM

6 Counterclaimant DALESSIO alleges and counterclaims as follows:
7

8 JURISDICTION AND PARTIES

9
10 26. The Court has jurisdiction to receive this counterclaim because these claims are
11 ancillary to the claims alleged in the Complaint. Said counterclaim, however, removes
12 diversity from this action. As no federal question is involved, DALESSIO believes and
13 therefore requests that the case be sent to the State of California Court System in the County
14 of Monterey, where both individual defendants reside and where the DALESSIO FAMILY
15 (2003) TRUST was formed and holds its assets.
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19 27. The amount in controversy in this counterclaim, exclusive of interest and costs,
20 exceeds \$75,000.
21

22 28. Counterclaimant's JOHN DALESSIO and RITA DALESSIO are individuals
23 residing in Carmel Valley, CA. Counterclaimant DALESSIO FAMILY (2003) TRUST is a
24 trust organized and existing under the laws of California.
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27 29. DALESSIO is informed and believes and thereon alleges (allegation on such
28 basis shall henceforth be referred to as "on information and belief") that Commonwealth
29 Annuity and Life Insurance Company f/k/a ALLMERICA Financial Life Insurance and
30 Annuity Company (ALLMERICA) is a Massachusetts corporation with its principal place of
31 business in Massachusetts.
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2 30. Counterdefendants David SHANE, ANN SPARKMAN and VAUGHN
3 R.WALKER are California residents. The residencies of Does I through 20 are unknown at
4 this time.
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8 COUNT ONE (Fraudulent Nondisclosure Against ALLMERICA and SHANE)
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10 32. DALESSIO incorporates the allegations of Paragraphs 26 through 31 above.

11 33. In 1986, DALESSIO purchased a disability insurance policy from
12 ALLMERICA. Ten years later, in January, 1996, ALLMERICA sued DALESSIO, claiming
13 that statements on an application, not made to ALLMERICA, but allegedly relied upon by it,
14 did not accurately describe DALESSIO'S health at the time that he made application. The
15 policy contained a two year incontestability clause.
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19 34. Ten years later, in 2006, ALLMERICA'S action was tried before a jury, with
20 Judge Vaughn R. WALKER presiding.
21

22 35. DALESSIO, who had represented himself for the past six years (of the ten years
23 that JUDGE WALKER took to bring the two party action to trial), then was taking a new
24 prescription medication, in addition to Fexofenadine Hcl Tabs 180MG, Omeprazole Caps
25 20MG, Paroxetine Hcl Tabs 20MG, Lipitor Tabs 20MG, Bupropion Hcl Sr Tabs 100MG,
26 1%Epipen Syringe 0.3MG, Ibuprofen Tabs 800MG, and Albuterol Inhaler 17gm 90MCG,
27 and was suffering from lethargy, mood swings and mental confusion as a result of the
28 combined effects of the new and old medication. He asked to delay the trial for a short
29 period until he could withdraw from the medication, but JUDGE WALKER refused this
30 request. This was DALESSIO'S first request to delay anything during this ten year pretrial
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2 period.

3 36. DALESSIO was forced to retain counsel, which he did on April 20, 2006. Trial
4 commenced 30 days later, giving DALESSIO'S counsel twenty one (21) working days to
5 review the 289 legal documents already on file in the action, meet with DALESSIO and his
6 witnesses, research legal issues, witness lists and other papers, prepare trial briefs, and
7 prepare for trial.
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11 37. DALESSIO'S counsel requested a reasonable delay of trial in order to
12 familiarize themselves with the case and to prepare for trial, but JUDGE WALKER denied
13 their request. WALKER expressed the belief that the two attorneys could somehow digest
14 the 289 documents on file with the Court; the cases of evidence provided by DALESSIO;
15 research the law; decide on a trial strategy; interview witnesses; read, review and catalogue
16 numerous depositions; prepare witness lists pretrial motions and a trial brief; review
17 submissions from Allmerica and respond to them; and prepare a witness with unique
18 memory and mental confusion problems, which were compounded by multiple prescription
19 drugs; all within twenty-one days.
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25 38. At the commencement of trial, JUDGE WALKER ordered that no witness
26 could be present during the trial, other than for his or her testimony. This order specifically
27 required that Rita DALESSIO, who was called out by JUDGE WALKER, to agree not to
28 testify in order that she might attend the trial in support of her husband.
29
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31 39. ALLMERICA'S only testimony as to alleged damages that it suffered was
32 presented by ALLMERICA'S court-disqualified co-counsel, who was present during the
33 entire trial, but was permitted to testify by JUDGE WALKER. On cross examination, this
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1 witness admitted that (now) Counterdefendant SHANE was the sole source of the
2 information that he presented. JUDGE WALKER allowed the testimony to stand, and form
3 the basis for a later damage decision.
4

5
6 40. During the punitive damage phase of the trial, ALLMERICA presented no
7 admissible evidence concerning DALESSIO'S alleged present wealth. DALESSIO testified
8 that his sole income was a disability check from the federal government. The court, however,
9 permitted (now) Counterdefendant SHANE to present evidence of DALESSIO'S past
10 wealth, and to argue without supporting facts that DALESSIO presently was a wealthy man.
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13 41. During his charge to the jury, JUDGE WALKER interjected his own opinion
14 into the proceedings, instructing the jury that, "... DALESSIO has substantial resources."
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17 42. In July, 2006 the jury's verdict was subject to a Motion for New Trial, Motion
18 to Amend Clerk's Judgment, Motion to Stay Clerk's Judgment, Motion for Relief under
19 FRCP Rule 60 and Motion for Relief under Rule 50(b) all filed on behalf of JOHN
20 DALESSIO.
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23 43. Rather than wait for JUDGE WALKER'S opinion and/or take the matter to
24 appeal, DALESSIO chose to settle the case for the approximate amount of the actual
25 damages claimed by ALLMERICA. He did so with the certainty that the punitive judgment
26 could not stand, and the express promises from ALLMERICA that the terms and conditions
27 of the Settlement Agreement would remain confidential, that ALLMERICA acknowledged
28 that its claims remained denied and contested, that ALLMERICA recognized that
29 ALLMERICA acknowledged that DALESSIO did not admit to any of the charges brought
30 against him by ALLMERICA and that ALLMERICA acknowledged that DALESSIO denied
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1 any liability in connection to any claims brought by ALLMERICA. ALLMERICA accepted
2 these terms and conditions, acknowledged that its claims were contested and that its claim
3 that it had been defrauded by DALESSIO would forever remain unresolved, and signed the
4 settlement agreement.
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8 44. At the time of these discussions between DALESSIO and ALLMERICA and
9 SHANE, and unknown to DALESSIO, ALLMERICA and SHANE did not intend to, and did
10 not then or at any time thereafter, abide by ALLMERICA'S express promise that the terms
11 and conditions of the Settlement Agreement would remain confidential; that it
12 (ALLMERICA) acknowledged that its claims remained denied and contested; that that it
13 (ALLMERICA) acknowledged that DALESSIO did not admit to any of the charges brought
14 against him by ALLMERICA; and that ALLMERICA acknowledged that DALESSIO
15 denied any liability in connection to any claims brought by ALLMERICA. ALLMERICA
16 accepted these terms and conditions, acknowledged that its claims were contested and that
17 its claim that it had been defrauded by DALESSIO remained unresolved. ALLMERICA and
18 SHANE evidenced their intent to defraud DALESSIO and dishonor ALLMERICA'S
19 settlement agreement by their failure to dismiss ALLMERICA'S action against DALESSIO.
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27 45. ALLMERICA'S intent to retain a finding of fraud against DALESSIO was
28 unknown to DALESSIO, and ALLMERICA and SHANE knew or should have known that
29 DALESSIO was unaware of this information. The Secret Information was thus in the
30 exclusive possession of ALLMERICA and SHANE. DALESSIO was unaware of the
31 information at the time ALLMERICA agreed to settle its action against DALESSIO or at any
32 time until after the negotiations and settlement agreement had been completed.
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1 ALLMERICA and SHANE intentionally concealed this information from DALESSIO in
2
3 order to obtain DALESSIO'S agreement to settle an action that almost certainly would have
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5 been reversed upon appeal. DALESSIO would not have settled the case had he known that
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7 ALLMERICA and SHANE did not intend to dismiss ALLMERICA'S action and remove
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9 from the records a finding that DALESSIO had defrauded ALLMERICA

10 46. The concealed intent of ALLMERICA and SHANE not to dismiss
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12 ALLMERICA'S action against DALESSIO was material in that, had it been disclosed to
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14 DALESSIO, he (DALESSIO) would not have accepted the settlement agreement, but would
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16 have demanded that JUDGE WALKER rule on his post-trial motions, and then have
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18 processed his many appeal issues (JUDGE WALKER told DALESSIO'S attorneys that
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20 should the case return to the district court, he, JUDGE WALKER, would not handle it)
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22 before the appellate court. ALLMERICA and SHANE'S failure to disclose its intent not to
23
24 honor the terms of the settlement agreement constitutes fraudulent concealment and
25
26 nondisclosure of material fact.

27 47. Had DALESSIO been aware of ALLMERICA and SHANE'S intent not to
28
29 honor the terms of the settlement agreement DALESSIO would have taken all necessary
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31 steps to clear and preserve his otherwise unblemished seventy year plus reputation.
32
33 DALESSIO'S reputation and he himself has mentally and physically suffered because of
34
35 ALLMERICA'S and SHANE'S fraudulent conduct. DALESSIO has thus suffered damages
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37 in an amount of at least \$250,000.

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2 48. ALLMERICA'S and SHANE'S actions were malicious, oppressive and
3 fraudulent; ALLMERICA and SHANE acted in willful and conscious disregard of
4 DALESSIO'S rights.

5
6 WHEREFORE, DALESSIO demands judgment against ALLMERICA and SHANE
7
8 as set forth below.

9
10 COUNT TWO - (Fraud—Release Agreement Against ALLMERICA and SHANE)

11 49. DALESSIO incorporates the allegations of Paragraphs 32 through 48 above.

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13 50. In order to induce DALESSIO to settle his action against ALLMERICA,
14 ALLMERICA and SHANE made promises and representations to DALESSIO, including,
15 inter alia, that they did not intend to sue DALESSIO for any other claims, and that they
16 intended to abide by the terms and conditions of a settlement agreement by which
17 ALLMERICA would release all past claims against DALESSIO. ALLMERICA and
18 SHANE made these representations and promises with the intent that DALESSIO would
19 rely on them.
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24 51. DALESSIO did, in fact, justifiably rely to his detriment on the promises and
25 representations of ALLMERICA and SHANE. In reliance on such inducements,
26 DALESSIO entered into a written agreement entitled SETTLEMENT AGREEMENT AND
27 GENERAL RELEASE (the "Settlement Agreement") with ALLMERICA during
28 October/November, 2006 and immediately paid ALLMERICA one hundred and sixty five
29 thousand dollars (\$165,000) pursuant to the terms of that agreement.
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33 52. The representations by ALLMERICA and SHANE were false and fraudulent in
34 that ALLMERICA and SHANE did not intend to dismiss ALLMERICA'S case against

1 DALESSIO, but intended to sue DALESSIO for additional damages and did not intend to
2 perform the promises and obligations set forth in the Settlement Agreement. ALLMERICA
3 (Commonwealth) later violated such promises by, among other things, filing this action
4 against DALESSIO. Had DALESSIO known the true facts, he would not have entered into
5 the Settlement Agreement and would not have paid ALLMERICA one hundred and sixty
6 five thousand (\$165,000) dollars. As a proximate result of its reliance, DALESSIO has been
7 damaged in an amount of at least \$250,000.

8
9 WHEREFORE, DALESSIO demands judgment against ALLMERICA and SHANE
10 as set forth below.

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13 COUNT THREE - (Breach of Contract Against ALLMERICA)

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15 53. DALESSIO incorporates the allegations of paragraphs 32 through 52, above.

16
17 54. During October/November, 2006 ALLMERICA entered into the Settlement
18 Agreement and covenanted not to sue DALESSIO on the claims released therein. The
19 Release Agreement provides for costs and fees, and for injunctive relief in the event of
20 breach by ALLMERICA.

21
22 55. DALESSIO timely has made performance under the Settlement Agreement on
23 his part to be performed in that he paid ALLMERICA the sum of one hundred and sixty five
24 thousand dollars (\$165,000).

25
26 56. ALLMERICA has breached the Settlement Agreement by its failure to dismiss
27 its federal court case against Dalessio, its failure to release him from all claims asserted in
28 that action, and by filing this action and these breaches have directly caused damage to
29

1 DALESSIO in an amount to be proved at trial, in addition to costs and attorney fees as set
2
3 forth in the Settlement Agreement.

4
5 57. And as a further result of ALLMERICA'S breach DALESSIO is incurring
6 irreparable harm due to the pendency of ALLMERICA'S claims in breach of the Settlement
7 Agreement
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9 WHEREFORE, DALESSIO demands judgment against ALLMERICA and SHANE
10 as set forth below.
11

12
13 COUNT FOUR (fraud Against
14 ALLMERICA, WALKER, SHANE, SPARKMAN and Does 1 through 20)
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16 58. DALESSIO incorporates the allegations of Paragraphs 32 through 57 above,
17 and the statements of fact and allegations contained in Exhibit 1, incorporated in by
18 reference and attached to this Counterclaim.
19

20
21 59. Allmerica Financial Corporation, Inc. (hereinafter "Allmerica") was a
22 corporation organized under the laws of the Delaware, with its principal place of business in
23 Worcester, Massachusetts. Allmerica was authorized to, and does, conduct business in
24 California.
25

26
27 60. Defendant is informed and believes and thereon alleges, that Allmerica
28 Financial Life Insurance and Annuity Company (hereinafter "Allmerica Life") was a
29 subsidiary of Allmerica, wholly owned and controlled by its parent corporation.
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32 61. Allmerica Life was designated by Allmerica as the successor-in-interest to the
33 disability insurance business carried on by State Mutual Life Assurance Company of
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1
2 America (hereinafter "State Mutual") and/or SMA Life Assurance Company (hereinafter
3 "SMA") in or about 1995.
4

5 62. Thereafter, Allmerica and Allmerica Life engaged in the joint venture of Life
6 and Health Insurance. In approximately October, 1999, Allmerica sold Allmerica Life's
7 disability insurance business to Great-West Life and Annuity Insurance Co. of Denver
8 (hereinafter Great-West). The various remaining entities are represented in this action as
9 entities that are now known as Commonwealth.
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11

12
13 PRELIMINARY ALLEGATIONS - THE ALLMERICA POLICY

14 63. During March, 1988, Defendant was contacted by a sales representative for State
15 Mutual Life and SMA concerning his (Defendant's) need for disability insurance. Defendant
16 met with State Mutual/SMA representative, Raymond Gong, (hereinafter "Gong") on or
17 about March 30, 1988. and agreed to purchase a disability income insurance policy
18 (hereinafter "the Policy") from State Mutual. Prior to meeting in March, 1988, Defendant
19 and Gong had not known each other, and had never conducted business with each other.
20
21

22 64. At the time that Dalessio applied for the Policy, State Mutual/SMA, through its
23 agent, Gong, represented to Dalessio that if he became disabled, as defined in the Policy, it
24 (State Mutual/SMA) would pay Dalessio a monthly indemnity, beginning at \$3000 per
25 month, and adjusted annually thereafter pursuant to guidelines set forth in the Policy's
26 Additional Insurance and Cost of Living Adjustment Riders. As set forth in detail below,
27 State Mutual/SMA's promise was false.
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33 65. At the time that Dalessio applied for the Policy, State Mutual/SMA, through its
34 agent, Gong, told Dalessio that it (State Mutual/SMA) would obtain his (Dalessio's) medical

1 file from his physician, for use in making its (State Mutual/SMA's) underwriting decision.
2
3 Gong had been trained by a State Mutual/SMA Sales Manager Steven Branstetter, who had
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5 taught Gong that it was standard procedure for State Mutual/SMA to obtain a copy of the
6
7 attending physician's medical file. On or about March 31, 1988, Dalessio signed a blanket
8
9 authorization that allowed State Mutual and SMA to obtain, from any source, all of his
10
11 medical and financial records.

12 66. On or about April 12, 1988, APPS, acting as agent for State Mutual sent a
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14 medical examiner to conduct an examination of Dalessio. During the course of this
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16 interview, Dalessio told State Mutual, through its agents APPS and Semeieh, that his
17
18 physician was Maurice Cornfield, 9735 Wilshire Boulevard, Beverly Hills, California.
19
20 Dalessio also told State Mutual, through its agents APPS that he had suffered from
21
22 depression, and that a psychiatrist had proscribed and Dalessio had taken anti-depressant
23
24 medication for this condition. Dalessio also told State Mutual, through its agents APPS that
25
26 he received disability payments from the federal government.

27 67. State Mutual, through its agents APPS led Dalessio to believe that it was not
28
29 concerned with his depression. State Mutual confirmed this fact when, through its agents,
30
31 APPS did not include on its Application, Part II, information provided by Dalessio
32
33 concerning his depression. State Mutual's representation was false. As set forth in detail
34
below, State Mutual did not intend to and did not issue a policy to Dalessio. Its sister
company, SMS, however did issue a policy, using information compiled by State Mutual.

68. During April, 1988, State Mutual, through its Medical Director M. F. Bures,
M.D., wrote to Dr. Cornfield, as follows: "Dear Doctor: Your patient is applying for

1 insurance. Applicants often are unable to furnish adequate details of their medical history.
2
3 Please give me the benefit of your experience. A signed authorization is attached... PLEASE
4
5 INCLUDE ALL CONSULTATIONS, REASONS FOR AND RESULTS OF ALL SPECIAL
6
7 STUDIES.” (Capitalization in original document

8 69. On or about May 4, 1988, State Mutual, through its employee and Chief Medical
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10 Examiner Peter Swenson, received Dr. Cornfield’s reply, in which he stated that Dalessio’s
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12 four annual physical examinations had had revealed no medical problems, and that he had
13
14 neither treated nor operated on Dalessio. State Mutual, through Swenson and employee S.
15
16 Bray, also received from Dr. Cornfield a copy of Dalessio’s medical file. Said file included
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18 the information that Dalessio had suffered from depression, and noted the name of a
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20 psychiatrist, Allan Philips, M.D., who had had referred Dalessio to Dr. Cornfield, and who
21
22 had treated Dalessio for his memory loss. Included in Dr. Philips’ medical file were reports
23
24 on Dalessio’s condition submitted by Dr. Philips to the Office of Worker’s Compensation
25
26 Programs (hereinafter OWCP), from whom Dalessio was receiving compensation for a
27
28 partial disability.

29 70. State Mutual, through its agent Gong, also requested that Dalessio answer
30
31 questions concerning his finances. Dalessio and/or his accountant, Stephen Forbat, provided
32
33 approximate answers (to the nearest \$50,000) to questions asked by SMA, through its agent
34
Gong, who partially completed a State Mutual Confidential Financial Statement. State
Mutual/SMA, through its agent Gong and employee Swenson, accepted Dalessio’s and/or
Forbat’s responses without comment and without inquiring as to the source of Dalessio’s
income.

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2 71. Dalessio intended to purchase a policy from State Mutual. After completing the
3 application process, however, on or about June 15, 1988, Dalessio received from John
4 Quinlan, President of SMA, and Sheila St. Hilaire, Secretary of SMA, Insurance Disability
5 Policy No. S 594,333, from SMA, not State Mutual. Dalessio was unaware that he had been
6 insured by SMA, a stock corporation, rather than State Mutual, a mutual insurer, until July,
7 2001, when the separate corporate entities were clarified somewhat by a former Allmerica
8 employee.
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12 72. From the date of the Policy, March 31, 1988, to and beyond March 31, 1990,
13 Dalessio was regularly at work. During this two year period Dalessio's income from the
14 practice of law exceeded that of the previous year, and his net worth from his investments
15 increased in excess of one million dollars.
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19 73. At all times herein relevant, and in accordance with the terms and conditions of
20 Policy No. S 594,333, Dalessio fully performed thereunder, including, without limitation,
21 making full and complete annual premium payments.
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24 74. JUDGE WALKER'S participation in the scheme was revealed most clearly by
25 his consistent false representation of determinative facts. JUDGE WALKER knew that these
26 facts were not true, but he continued to repeat them, even when challenged to produce their
27 source. Many of JUDGE WALKER'S findings also were not supported by admissible
28 evidence, and/or his findings ignored sufficient counter evidence that raised fact questions a
29 jury, but could not be submitted to a jury because of JUDGE WALKER'S fraudulent
30 findings and decisions that conflicted with established California law.
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2 75. One element of the scheme was to provide applicants for State Mutual Life
3 disability policies with policies written by SMA, a for profit corporation. In his order of June
4 28, 2002 [Court document No. 229], granting ALLMERICA'S Motion for Summary
5 Judgment, and denying DALESSIO'S Motions for Summary Judgment, JUDGE WALKER,
6 fraudulently misrepresented that, "DALESSIO admits that he misrepresented his health on
7 his insurance application (to ALLMERICA)." JUDGE WALKER provided no citation for
8 and did not cite evidence to support his false claim, which conclusively determined the
9 outcome of that case in ALLMERICA'S favor. The facts are and were that DALESSIO did
10 not misrepresent his health to ALLMERICA on its insurance application, and he certainly
11 never admitted to doing so.
12

13 76. Under California law, ALLMERICA failed to produce admissible evidence to
14 show that DALESSIO made any representations concerning his health to it. DALESSIO
15 also presented substantial documentary evidence, witness testimony, admissions by
16 ALLMERICA and circumstantial evidence to show that he had not misrepresented his health
17 to ALLMERICA. This evidence was not contested. Examples of ALLMERICA'S
18 admissions, that DALESSIO had neither misrepresented his health to ALLMERICA, nor
19 "admitted" to this alleged misrepresentation, were recorded during his deposition:
20

21 77. DALESSIO did, however, provide answers to questions concerning his health to
22 State Mutual Life Assurance Company of America (State Mutual Life). The fact that
23 DALESSIO applied for a disability insurance policy from and submitted an Application, Part
24 II to State Mutual Life, not ALLMERICA, is not, and cannot be contested. This fact was
25 stated on the face of the Application, which had been before the Court for more than eight
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2 years. This fact repeatedly was admitted by ALLMERICA, through its attorney, SHANE, as
3 follows:
4

5 Q "Do you recall anything about your applying for disability insurance with State
6 Mutual Life Assurance?"
7

8 ** * *

9
10 Q (describing the application)"...It says "Declaration to State Mutual Life Assurance
11 Company of America," and it mentions Ray Gong, Beverly Hills. That's on the top portion
12 of it. ..."
13

14 ** * *

15
16 Q "It's your testimony like (sic) with respect to the State Mutual Life Assurance
17 application, which is marked as Exhibit G, that you have no personal recollection of any
18 events or transactions concerning your application for this policy?"
19

20
21 78. An independent witness, Mrs. Karen Love, was present when DALESSIO was
22 interviewed by State Mutual Life's medical examiner. Mrs. Love declared, under oath, that
23 in the spring of 1988, she was in DALESSIO'S outer office and overheard him answering
24 questions about his health. It is uncontested that the answers that Mrs. Love stated that she
25 heard DALESSIO give the insurance examiner were true. In dismissing DALESSIO'S
26 counterclaim, JUDGE WALKER refused to consider Mrs. Love's testimony on the grounds
27 that there was no evidence that Mrs. Love had heard DALESSIO'S meeting with a State
28 Mutual Life medical examiner. WALKER made this determination while ignoring the
29 following facts:
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2 a. DALESSIO purchased one disability insurance policy in 1988. During the spring
3 of that year, DALESSIO met once, on April 12, 1988, with an insurance health examiner.
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5 At 11:00 AM, on that date, a health examiner for State Mutual Life obtained from
6 DALESSIO an authorization to take samples of his blood. DALESSIO'S date book
7
8 established that Mrs. Karen Love had an appointment with DALESSIO at 11:30 AM on
9
10 April 12, 1988. At no other time or day during the spring of the year 1988 did DALESSIO
11
12 have an appointment with anyone concerned with insurance that might have extended into
13
14 an appointment with Mrs. Love. These facts, which are supported by documentary evidence
15
16 (a bound date calendar), are sufficient for a jury to conclude that Mrs. Love overheard part of
17
18 State Mutual Life's medical examination of DALESSIO.

19 b. Mrs. Love was a nurse, and therefore likely to have recalled a conversation that
20
21 involved surprising revelations about DALESSIO'S health. She testified that during the
22
23 spring of 1988, she overheard DALESSIO tell an "insurance man," that he DALESSIO
24
25 suffered from depression and that DALESSIO received partial disability benefits from the
26
27 federal government. Mrs. Love heard the "insurance man" tell DALESSIO that the insurance
28
29 company would obtain his medical records and make its policy decision from those records.
30
31 These facts are evidence from which a jury could conclude that Mrs. Love heard DALESSIO
32
33 provide State Mutual Life with accurate information about his medical history.
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79. DALESSIO provided State Mutual Life with the name and address of his primary
care physician. It is uncontested that: a) DALESSIO had been referred to this physician by
his treating psychiatrist. b) The information that ALLMERICA claims was withheld from
State Mutual Life was set forth in this psychiatrist's notes, letters and tests. And, c)

1
2 DALESSIO had been told by State Mutual Life's insurance agent who sold DALESSIO the
3 policy, as well as State Mutual Life's medical examiner, that State Mutual Life would obtain
4 these records. These undisputed facts establish that DALESSIO had every reason to believe
5 that State Mutual Life would obtain his medical records from his physician and his
6 psychiatrist, and know his medical history. Under California law, these facts also are
7 circumstantial evidence, suitable for review by a jury, that DALESSIO provided State
8 Mutual Life with accurate information about his medical history.
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13 80. In 1987 DALESSIO purchased his first disability insurance policy. Benefits from
14 this policy were twice as large as the SMA policy, but ended at age 65. The SMA policy was
15 a lifetime policy. After obtaining the SMA policy, DALESSIO also purchased a life
16 insurance policy. DALESSIO chose not to purchase a waiver of premium for disability on
17 the life insurance policy. These facts are not disputed. His purchase of a much larger
18 disability policy without lifetime benefits, and a life insurance policy without a disability
19 waiver were not consistent with the actions of one who intended to defraud an insurer, and
20 were circumstantial evidence that DALESSIO did not intend to defraud SMA.
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25 81. During this period, DALESSIO represented his children and himself in three very
26 serious automobile accidents. In two of these accidents his car was totaled. In each accident
27 the other driver admitted that he or she was at fault. DALESSIO did not submit personal
28 injury claims for any of these accidents. These accidents provided ample opportunity for
29 DALESSIO to defraud insurers, if DALESSIO had any inclination to do so. The fact that
30 DALESSIO settled each claim for the insurance company's estimate of damage to the
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2 vehicle is circumstantial evidence that DALESSIO would not file a fraudulent insurance
3 claim.
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5 82. DALESSIO am an individual who enjoyed a distinguished career, as an attorney
6 on Wall Street, with the Federal Government, as Special Counsel to New York Governor,
7 Nelson Rockefeller, and as a partner in a Century City (Los Angles) law firm. DALESSIO
8 also served as President of the Greater Los Angles Urban Coalition, and as Country Director
9 for the United States Peace Corps. DALESSIO also was a leader in Los Angles' volunteer
10 community. DALESSIO was not likely to suddenly embark on a career of insurance fraud.
11

12 83. JUDGE WALKER'S findings, that DALESSIO both committed what amounted
13 to the felony of insurance fraud against ALLMERICA and that DALESSIO admitted to
14 doing so, I s a false and malicious statement. Protected by his judicial robes, JUDGE
15 WALKER tried to pass off his defamatory finding as "judicial analysis." The fact that he
16 used this known falsehood as the basis for his Summary Judgment decisions demonstrated
17 JUDGE WALKER'S participant in the Allmerica's fraudulent scheme. JUDGE WALKER
18 was unable to cite evidence that supported his false and defamatory allegations, even when
19 given a second opportunity to do so.
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27 84. JUDGE WALKER falsely claimed and made a judicial finding that DALESSIO
28 had, "...no long term (sic) memory of events that occurred after 1980." Again, JUDGE
29 WALKER did not cite evidence in the record to substantiate this false claim. JUDGE
30 WALKER then used his misrepresentation to rule that DALESSIO could not testify that he
31 (DALESSIO) was working in 1989.
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2 85. More than twenty medical experts filed reports concerning DALESSIO'S 1980-
3 1993 illnesses and memory. Not one of these medical experts agreed with JUDGE
4
5 WALKER'S claim that DALESSIO could remember no events after 1980.

6 86. DALESSIO testified under oath about memories of events that occurred after
7
8 1980. During the first day of his deposition ALLMERICA attorney David SHANE tested
9
10 his memory, and DALESSIO was able to answer Mr. SHANE'S questions. During the
11
12 second day of his deposition, Mr. SHANE asked DALESSIO about his memory loss:

13 Q. When you say you have been told lots of things (about his loss of memory), what
14
15 things have you been told?

16 A. I have been told it's caused by depression. I've been told it's caused by brain
17
18 damage. ... There's sort of an ongoing debate.

19 Q. What kind of brain damage have you been told?

20
21 A. I have been told it's—more than likely I had encephalitis in Fiji and that it
22
23 affected a certain part of his brain which has to do with one kind of memory.

24 Q. Who told you that?

25 A. All sorts of doctors have told me that. (Emphasis added)

26
27 87. At his deposition, DALESSIO recalled the names of his neighbors during the
28
29 1980's; he remembered that he had worked as an Ambassador in the 1984 Olympics; he
30
31 knew that he had bought and sold various properties in the 1980's; and, he recalled that,
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33 during the 1980's, he had lost money in a business venture with his accountant/tax advisor,
34
Steve Forbat.

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2 88. DALESSIO so proved the fact that he could recall events during the 1980s, that
3 only a jurist committed to the fraudulent scheme would falsely state that DALESSIO
4 remembered no such events. JUDGE WALKER simply ignored all of this evidence.
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6 89. JUDGE WALKER falsely asserted that, "In his deposition, DALESSIO stated
7 that he
8

9 could not remember any transactions without reference to his calendars and other
10 records." DALESSIO never made this statement. He did say: "If you asked me to account
11 for what I've done in the 1990's, I'd have a hard time doing that without referencing records
12 and my calendar." Based upon his false and fraudulent misrepresentation, JUDGE
13 WALKER concluded that, "...DALESSIO has no personal knowledge of the events of
14 1989." (Italics added).
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19 90. JUDGE WALKER found that the fact that DALESSIO had testified under oath
20 that he was working in 1989, was not admissible. He ignored the fact that DALESSIO
21 produced documentary and witness evidence that during 1989 DALESSIO was working, that
22 he had received a legal fee in excess of \$200,000, and that his work on a real estate project
23 produced a substantial profit.
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27 91. JUDGE WALKER'S false and fraudulent statement of fact, and his refusal to
28 consider documentary evidence, followed by his illogical conclusion (1989 obviously did not
29 occur in the 1990's), further evidenced that JUDGE WALKER had conspired with
30 ALLMERICA, SHANE and SPARKMAN to deny DALESSIO his right to have his
31 counterclaim heard by a jury and to produce a per-determined outcome for its action against
32 DALESSIO.
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2 92. Two experts retained by ALLMERICA established that, as of 1993, DALESSIO
3 had

4
5 limited memory capacity for certain kinds of memory. They also found that other
6 centers of his memory remained intact.
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8 93. ALLMERICA produced no admissible evidence that DALESSIO'S memory loss
9 was sufficient to prevent DALESSIO from testifying in his own defense. JUDGE WALKER,
10 however, struck DALESSIO'S declaration in support of his own claim based upon his
11 (WALKER'S) finding that DALESSIO had no memory, and then required him to testify,
12 shackled by the above noted ruling that he (DALESSIO) had no memory, at trial of
13 ALLMERICA'S complaint.
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17 94. JUDGE WALKER assumed the role of an expert on the neurology of
18 DALESSIO'S brain. He found, without supporting evidence, that the extent of
19 DALESSIO'S memory loss was far greater than did any of the experts that examined
20 DALESSIO. He determined that his memory loss prevented DALESSIO from testifying,
21 even as to matters known to DALESSIO from intact memory centers.
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25 95. JUDGE WALKER had seen DALESSIO twice. DALESSIO first appeared before
26 the Judge on December 29, 2000, pursuant to his Motion to Substitute Attorney. JUDGE
27 WALKER asked DALESSIO a few perfunctory questions, and then determined that
28 DALESSIO was competent to represent himself in this action. [145]
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32 96. Having made the determination that Dalessio could remember nothing, even
33 when confronted with conclusive evidence to the contrary, JUDGE WALKER'S later
34 decision to find DALESSIO incompetent to testify, without taking the trouble to examine

1 DALESSIO, could only have been based upon WALKER'S participation in the
2
3 ALLMERICA/SHANE/SPARKMAN conspiracy to deprive DALESSIO of his right to a fair
4
5 and impartial trial, and to prevent DALESSIO from recovering damages from
6
7 ALLMERICA, and to require DALESSIO to pay damages to ALLMERICA.

8 97. During trial JUDGE WALKER determined that DALESSIO was competent to
9
10 testify. Hamstrung between WALKER'S finding that he (DALESSIO) had no memory and
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12 SHANE'S repeated and repetitive questions (permitted by Judge Walker, over objection) to
13
14 DALESSIO about his activities in the 1980' and 1990's, drugged into a fog, and represented
15
16 by inadequately prepared counsel, DALESSIO was unable to present the facts and issues
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18 presented here.

19 98. DALESSIO was then confronted by a situation in which, if he testified to what he
20
21 believed to be the truth, that he recalled events from the 1980's, he was disregarding the
22
23 established finding of JUDGE WALKER and placing himself in jeopardy of sanctions from
24
25 the judge. No fair trial could proceed under such conditions, but Walker was not interested
26
27 in a fair trial.

28 99. Without supporting expert evidence, JUDGE WALKER had no basis upon
29
30 which to determine that DALESSIO had no memory. Further, by inserting himself as a
31
32 supposedly qualified expert, JUDGE WALKER revealed not only his bias and prejudice,
33
34 and his cooperation with the /ALLMERICA/SHANE/SPARKMAN fraudulent conspiracy,
but his ignorance of brain neurology. JUDGE WALKER, for example, appeared not to
know, or pretended not to know, that several different memory centers are present in the
human brain. And that damage to one of these centers would not necessarily cause loss of

1
2 function to other memory centers. JUDGE WALKER even forgot (or chose to ignore, or
3 lied about) the common knowledge that memory is flexible. Over time, it inexorably will
4 diminish, and sometimes will improve. Also, memory can be “refreshed” by sensory prods, a
5 concept well known to the judiciary. When presented with scientific articles concerning
6 current memory research, from respected scientific journals, JUDGE WALKER, true to his
7 participation in the scheme ignored them.
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11 100. JUDGE WALKER’S lack of knowledge or his willful misstatements about
12 memory may have caused him to state falsely that DALESSIO provided only three reasons
13 why rescission of the Policy would be improper. JUDGE WALKER omitted his first and
14 the most important reason. DALESSIO knew himself, and he knew the kinds of conduct in
15 which he would and would not have engaged. His memory for this type of knowledge
16 remained intact. Therefore, DALESSIO know that he did not intend to defraud State Mutual
17 Life and he did not deliberately misrepresent his health when he applied for the with State
18 Mutual Life. The fact that DALESSIO retained memory for this type of knowledge was
19 admitted by ALLMERICA, through its own medical expert, Dr. Marion Schulman. She
20 found that his memory for social awareness remained intact. JUDGE WALKER ignored this
21 admitted fact, again demonstrating his bias and prejudice and his commitment to the
22 fraudulent conspiracy.
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30 101. JUDGE WALKER accepted as established fact ALLMERICA’S
31 unsubstantiated claim that “In his application, DALESSIO represented (to
32 SMA/ALLMERICA) that he was in good health.” JUDGE WALKER’S only source for
33 this alleged fact was a declaration from an ex-ALLMERICA Vice President, Thomas
34

1 Kwasniak (Kwasniak). It is uncontested that, prior to submitting his declaration, Kwasniak
2 testified falsely under oath on multiple occasions concerning ALLMERICA'S records. His
3 testimony was suspect, and his credibility, at a minimum, subject to review by a jury.
4

5
6 102. Kwasniak admitted that he was not present during his 1988 medical
7 examination, (he was not employed by ALLMERICA until eight years after DALESSIO
8 purchased the policy, and there is no evidence in the record that he ever was employed by
9 State Mutual Life, the insurance company to whom DALESSIO submitted the insurance
10 application). Kwasniak also admitted that he never talked to State Mutual Life's medical
11 examiner. Accordingly, Kwasniak had neither personal nor second hand knowledge of what
12 DALESSIO said to State Mutual Life during the medical application process.
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17 103. ALLMERICA'S files were not sufficiently reliable to qualify for the hearsay
18 exception as documents "maintained in the normal course of business." Kwasniak testified
19 that ALLMERICA'S records had been taken apart and, at best, clumsily reassembled after
20 they originally had been compiled. For reasons that ALLMERICA did not divulge, some
21 documents had been taken from the file and not replaced and other documents had been later
22 added to these files by persons not identified by ALLMERICA. Thus, ALLMERICA'S files
23 were not admissible as an accurate record as to their contents in 1988. Accordingly,
24 Kwasniak's claim, that DALESSIO had misrepresented his health to SMA/ALLMERICA,
25 was not supported by admissible documentary evidence, even if such evidence could have
26 been found in those records, which it was not.
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33 104. JUDGE WALKER falsely and incorrectly stated that DALESSIO did not object
34 to evidence from Kwasniak. In fact, DALESSIO did object to ALLMERICA'S

1 (Kwasniak's) testimony. [Docket documents Nos. 133, 168] JUDGE WALKER denied these
2 objections. He determined, without explanation, that the undisputed fact that Kwasniak
3 twice had made false statements under oath, did not raise a question for a jury as to
4 Kwasniak's credibility. JUDGE WALKER also determined that the fact that Kwasniak had
5 no first hand knowledge of the events at issue, and that he testified from unreliable records,
6 was not sufficient to raise questions concerning the relevance of and/or the admissibility of
7 his testimony.
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10 105. Finding that testimony from an admitted perjurer, who relied upon tainted and
11 suspect records was conclusive evidence of a determinative question of fact, is further
12 evidence of JUDGE WALKER'S bias, prejudice and participation in the conspiracy to
13 defraud DALESSIO.
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16 106. DALESSIO was told by both State Mutual Life's sales agent and its medical
17 examiner that State Mutual Life would obtain his medical records from his primary care
18 doctor (Physician). DALESSIO also was told that State Mutual Life would rely on those
19 records in making its underwriting decision. His Physician's records included information
20 concerning his depression, and identified the psychiatrist who had referred DALESSIO to
21 the Physician. His psychiatrist's records contained numerous reports made to the Office of
22 Worker's Compensation Programs (OWCP). DALESSIO provided State Mutual Life with
23 the name and address of his Physician, and signed authorizations that permitted it to obtain
24 from him, or from any source, any and all of his medical records. Thus, all of his relevant
25 medical records were available to State Mutual Life upon its review of his Physician's
26 records. None of these facts were contested.
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2 107. Neither ALLMERICA nor JUDGE WALKER addressed this clear
3 circumstantial evidence that DALESSIO had no reason to misinform State Mutual Life's
4 medical examiner about his health, when two independent witnesses (one ALLMERICA'S
5 insurance salesman) testified that DALESSIO had been told that State Mutual Life would
6 obtain and review his medical records. In his opinion, JUDGE WALKER ignored the fact
7 that his Physician's records identified his psychiatrist, and that his (the psychiatrist's)
8 records led to all of his OWCP medical records.
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13 108. In 1993, ALLMERICA demanded that DALESSIO subject himself to a two day
14 examination by Dr. Marion Schulman. DALESSIO informed Dr. Schulman of his prior
15 illnesses, and informed her that his memory problems dated back to 1980. Dr. Schulman
16 reported these facts in writing to ALLMERICA. ALLMERICA does not contest these facts.
17 The fact that DALESSIO openly discussed the illness that he had contracted while working
18 in the South Pacific for the United States Peace Corps with ALLMERICA'S medical
19 examiner was circumstantial evidence that DALESSIO believed that State Mutual Life had
20 obtained and reviewed his medical records. The fact that ALLMERICA ignored this
21 information is circumstantial evidence that ALLMERICA knew about his prior illnesses
22 before 1993, and did not believe that they were grounds upon which to contest the Policy.
23 As part of the conspiracy to defraud DALESSIO, JUDGE WALKER ignored this evidence.
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30 109. JUDGE WALKER argued that, "DALESSIO now admits that he has been
31 disabled since 1980 ..." By saying "now admits" JUDGE WALKER created the false
32 impression that DALESSIO had changed his testimony during the course of this action.
33
34 DALESSIO has never denied that he suffered a disabling physical illness in 1980, and that

1
2 some aftereffects of this illness were permanent. As noted above, independent testimony
3 confirmed that in 1988 DALESSIO informed State Mutual Life (Love declaration) and in
4 1993 DALESSIO informed ALLMERICA (Schulman report) of these facts. DALESSIO also
5 provided State Mutual Life with access to all of his medical records. JUDGE WALKER'S
6 statement was, at best, misleading and further evidenced his bias, prejudice, and intent to
7 defraud DALESSIO.
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11 110. As noted, ALLMERICA'S own records conclusively establish that in 1993,
12 DALESSIO discussed his prior memory loss and illnesses with ALLMERICA'S
13 psychotherapist, who reported them to ALLMERICA. Upon receipt of this information,
14 ALLMERICA was under a statutory duty to investigate his claim, and promptly to file an
15 action if it determined that the claim was false. ALLMERICA, however, waited years before
16 it filed its action. This clear evidence of waiver was ignored by JUDGE WALKER.
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20 111. During this period of ALLMERICA'S unexplained delay, DALESSIO disposed
21 of his notes and possibly tapes of his meeting with State Mutual Life's medical examiner.
22 These records conclusively would have proved that DALESSIO was innocent of the charges
23 brought against DALESSIO by ALLMERICA. Accordingly, because ALLMERICA'S delay
24 in bringing its action negatively affected his ability to defend himself, it was estopped to
25 bring its action. Another fact ignored by JUDGE WALKER because of his bias, prejudice
26 and intent to commit fraud.
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32 112. ALLMERICA was required by California law to conduct an impartial
33 investigation that was at least as concerned with proving his claim as it was to disproving it.
34 JUDGE WALKER found that ALLMERICA had satisfied this requirement. ALLMERICA,

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2 however, admitted that SPARKMAN and SHANE made no attempt to interview anyone
3 with knowledge of the allegations in its action. It offered no evidence that they had in any
4 other manner attempted to obtain information that could prove his claim. It also violated
5 California law when it failed to provide DALESSIO with an opportunity to defend himself
6 against this charge, prior to having his name disparaged through legal process.
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10 113. ALLMERICA admitted that, had it conducted an impartial investigation, and
11 had it been told by its medical examiner that DALESSIO had fully revealed all of the facts
12 that ALLMERICA later claimed that DALESSIO withheld, (i.e. had DALESSIO proved his
13 claim) it still would have terminated his disability benefits and accused DALESSIO of fraud.
14 This was prime facie evidence, that ALLMERICA failed to conduct a required impartial
15 investigation, and that this intentional failure was based upon its predetermined intent to
16 terminate DALESSIO'S disability benefits, even if it had no lawful grounds upon which to
17 do so, and that ALLMERICA intended to defraud DALESSIO. ALLMERICA'S admitted
18 bad faith and its intent to commit fraud was ignored by JUDGE WALKER. Rather, he
19 refused to allow DALESSIO to bring these admitted facts before a jury, by refusing to grant
20 DALESSIO Leave to File an Amended Counterclaim. Without just cause or supporting
21 evidence, JUDGE WALKER protected ALLMERICA from its admitted bad faith and intent
22 to commit fraud.
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30 114. In his Motion for Reconsideration, DALESSIO presented facts stated above to
31 JUDGE WALKER. DALESSIO characterized JUDGE WALKER'S flawed findings as
32 "misstatements." DALESSIO used the nebulous term "misstatement" because of his respect
33 for the institution of the federal judiciary. By definition a misstatement can be either a
34

1
2 mistake or a misrepresentation. When confronted with his charge that he had made
3 numerous “misstatements,” JUDGE WALKER refused even to admit that his misstatements
4 were mistakes. Rather, he classified them as, “... the Court’s factual analysis.” (Emphasis
5 added)
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7
8 115. The clear, documented facts that DALESSIO presented were not challenges to
9 JUDGE WALKER’S analysis. They were challenges to his competence, to his credibility
10 and, because of his failure to correct them, to his integrity. JUDGE WALKER’S refusal to
11 correct his “misstatements” is substantial evidence that WALKER’S “misstatements” were
12 in fact deliberate acts of fraud. JUDGE WALKER is a compromised man, who used his
13 judicial position to drag out for ten years a flawed, outdated claim by ALLMERICA, a claim
14 that summarily would have been dismissed by an untainted judge. Few, if any, impartial
15 observers would disagree with this conclusion.
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19 116. JUDGE WALKER’S participation in fraud with ALLMERICA and SHANE is
20 evident in ALLMERICA’S false claims under oath, SHANE’S suppression of evidence, and
21 Walker’s refusal to afford DALESSIO fair and liberal discovery, as required by the Federal
22 Rules. In its response to his Request for the Production of Documents, ALLMERICA,
23 through its former Vice President, Kwasniak, misrepresented, under oath (after prodding),
24 that it had produced all relevant documents from ALLMERICA’S files. The documents that
25 SHANE provided omitted any document (there are several) that evidenced that State Mutual
26 Life had contacted DALESSIO’S primary care physician, Dr. Maurice Cornfield, before
27 SMA/ALLMERICA issued a policy to DALESSIO.
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2 117. DALESSIO knew that ALLMERICA and SHANE had withheld key documents,
3 which it was required to produce, because, unbeknownst to ALLMERICA, DALESSIO had
4 obtained copies of these documents from State Mutual Life's former insurance salesman,
5 Raymond Gong. But for his fortuitous contact with Gong, ALLMERICA'S and SHANE'S
6 withholding of these documents would have prevented DALESSIO from ever knowing that
7 State Mutual Life had communicated with and obtained medical information from Dr.
8 Cornfield before it issued the Policy. This evidence was essential to DALESSIO'S defense.
9 These documents showed that State Mutual Life sought and obtained his medical records
10 before a policy was issued to DALESSIO. Therefore, neither State Mutual Life nor
11 ALLMERICA could have reasonably relied upon statements contained in the Application.
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13
14 When this misrepresentation was exposed, ALLMERICA, through Kwasniak,
15 admitted that State Mutual Life had contacted his Physician during the application process. It
16 next claimed, however, that State Mutual Life had never received any of his Physician's
17 medical files. Again, ALLMERICA'S sworn testimony was false. State Mutual Life had
18 obtained DALESSIO'S Physician's medical files. This fact was proven conclusively when
19 DALESSIO'S then attorney found parts of his Physician's files among ALLMERICA'S
20 records.
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22
23 118. Established presumptions under both California and Federal law required that
24 ALLMERICA and SHANE explain its prior false answers, before it proffered further
25 evidence related to this perjurious testimony. ALLMERICA and SHANE never offered, nor
26 did JUDGE WALKER ever require any explanation as to why it (ALLMERICA) had
27 testified falsely, under oath, on two occasions. JUDGE WALKER simply accepted
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2 ALLMERICA'S next unsupported representation as to how it came to possess his medical
3 records. Records that ALLMERICA had claimed, under oath, that it had never requested,
4 and had claimed, under oath, that it had never possessed.
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6 119. JUDGE WALKER repeatedly was informed of DALESSIO'S many efforts to
7 have ALLMERICA and SHANE voluntarily comply with Federal Discovery Rules. When
8 asked to enforce these rules, JUDGE WALKER delayed his decision on DALESSIO'S
9 motions for five years, before deciding that the issues were complex and passing
10 DALESSIO'S Motions on to a Magistrate Judge. In this manner, JUDGE WALKER aided
11 and abetted ALLMERICA'S and SHANE'S avoidance of discovery. The documented facts
12 supporting his contention that JUDGE WALKER'S handling of discovery was biased and
13 prejudiced and in furtherance of a plan or scheme to defraud DALESSIO
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19 a. In January, 1996 ALLMERICA served its complaint for fraud and restitution
20 against DALESSIO. In March, 1977, Allmerica finally produced in an incomprehensible pile
21 what it claimed were its complete records. In June, 1977 Counsel for Dalessio twice wrote to
22 ALLMERICA/SHANE detailing the deficiencies in its response to production. The latter
23 letter stated: "ALLMERICA'S 'response' was unprofessional, unethical and insulting. It
24 consisted of nonsense objections, incomplete, inaccurate, and in certain instances blatantly
25 false answers, and document production that conveniently omitted most of the documents
26 that supported Mr. DALESSIO'S claims."
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32 b. In July, 1977, Counsel for Defendant filed a Motion to Compel Discovery.
33 ALLMERICA and SHANE claimed, for the first time, that it withheld discovery because
34 settlement negotiations were ongoing. This claim was false. ALLMERICA had offered to

1 drop its action if DALESSIO would forgo future compensation payments.

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3 ALLMERICA/SHANE was informed in writing that DALESSIO would not discuss
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5 settlement until ALLMERICA had provided missing answers to his Interrogatories and
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7 Admissions, and had produced all documents not otherwise privileged.

8 c. DALESSIO continued to try to get ALLMERICA to answer and verify
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10 interrogatories for two more years, and many tens of thousand of dollars in attorney fees,
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12 after which he submitted the permitted two page letter to the Court asking it to order
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14 ALLMERICA to comply with the discovery rules.

15 d. JUDGE WALKER responded to DALESSIO'S unopposed discovery motion by
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17 freezing DALESSIO'S discovery for a period of two years, while permitting SHANE to take
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19 DALESSIO'S deposition on four separate occasions over this period. Walker never ruled on
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21 DALESSIO'S request. When DALESSIO later submitted a request for a decision, JUDGE
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23 WALKER determined that, because of its knowledge of the case, he would decide discovery
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25 issues, rather than refer them to a magistrate. Rather than rule on DALESSIO'S long
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27 outstanding and unopposed discovery request, JUDGE WALKER ordered DALESSIO to
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29 submit a new two page letter outlining ALLMERICA'S discovery omissions. Subsequently,
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31 DALESSIO submitted this letter as ordered. JUDGE WALKER never ruled on his second
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33 letter.
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30 e. JUDGE WALKER later admitted that his remedy of freezing his discovery, and
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32 placing the discovery timetable in ALLMERICA'S hands was "drastic." He took this
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34 "drastic" step, and sent this case into an inactive limbo, because, he claimed, that

1 DALESSIO had been responsible for delaying discovery during the years 1998 and 1999.
2
3 JUDGE WALKER'S claim was false, and was known by him to be false.
4

5 f. In February 19, 2001: DALESSIO submitted his Fourth Request for an order
6 compelling ALLMERICA to comply with his discovery, and in April, 2001: DALESSIO
7 submitted a formal Motion to Compel Discovery. Because JUDGE WALKER had stated
8 that it was familiar with the discovery issues and that he would decide discovery questions,
9 DALESSIO based this Motion on previously submitted documents. In June, however,
10 JUDGE WALKER reversed his prior decision and referred DALESSIO'S Motion to Compel
11 to Magistrate Judge Edward Chen. DALESSIO suspects that Justice Chen never saw the
12 prior discovery documents upon which his Motion was based. If these documents were not
13 submitted with his Motion, it would have been impossible for Justice Chen to understand the
14 discovery issues involved.
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20 g. DALESSIO had intended to conduct depositions of ALLMERICA witnesses after
21 he had received and reviewed answers to interrogatories and requested documents, so that he
22 could integrate these interrogatory answers and documents into his questions. Now four and
23 one half years into the case, DALESSIO gave up hope of ever receiving meaningful
24 discovery from ALLMERICA/SHANE/WALKER axis, and he (DALESSIO) scheduled
25 depositions of ALLMERICA'S witnesses.
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30 h. During these depositions, DALESSIO learned enough facts to enable him to draw
31 up an Amended Counterclaim. DALESSIO obtained these facts over repeated interruptions
32 and "client conferences" by ALLMERICA'S attorney, SHANE, who, it turned out, did not
33 represent the person deposed. DALESSIO did not protest this abuse to JUDGE WALKER
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1 because DALESSIO believed that WALKER'S participation in the ALLMERICA/SHANE
2 scheme to defraud was so complete that bringing anything to WALKER'S attention would
3 be turned against him (DALESSIO).
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6 i. September 4, 2001: ALLMERICA was ordered by Magistrate Judge Chen to
7 produce certain documents. It (ALLMERICA) failed timely to produce any of these
8 documents. It later stated that it would produce some of these documents only after
9 DALESSIO paid it (ALLMERICA) the sum of \$1,000,000. DALESSIO did note
10 ALLMERICA'S failure to comply with the Court's order, but JUDGE WALKER ignored
11 this information.
12

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14 j. In essence, this case took more than ten years to come to trial, and DALESSIO
15 never received an order of any kind from JUDGE WALKER that interfered with
16 ALLMERICA executing its stonewalling discovery technique.
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19 120. In July 2001, DALESSIO finally obtained his first meaningful discovery since
20 1997. New information that DALESSIO learned included: ALLMERICA/SHANE knew that
21 its claim that DALESSIO had been residually disabled during the contestable period was
22 false, and was known by ALLMERICA/SHANE to be false when it was made;
23 ALLMERICA/SHANE knew that it had no information to prove that DALESSIO had been
24 totally disabled during the contestable period, as it had later claimed; ALLMERICA and
25 SHANE knew that ALLMERICA'S Application File contained documents that belonged in
26 the Claims File, and vice versa; and, documents had been added to and removed from
27 ALLMERICA'S files by persons unidentified by ALLMERICA and for purposes
28 unexplained by ALLMERICA. In summary, ALLMERICA'S files were in disarray. It could
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2 not prove the content of those files in 1988 from an analysis of the content of those files in
3 1995, or thereafter.
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5 121. DALESSIO also learned that:

6 a. ALLMERICA/SPARKMAN had not conducted an investigation in which it
7 sought evidence to support his claim, as required by California law; ALLMERICA/
8 SPARKMAN did not conduct an impartial investigation, because it had found an excuse (the
9 pending indictment) to terminate DALESSIO'S benefits;
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12 b. ALLMERICA, through its attorney Debra Connor, admitted that even if its
13 medical examiner confirmed the testimony of Karen Love (that DALESSIO informed State
14 Mutual Life of his prior illness and his receipt of federal disability benefits), ALLMERICA
15 still would have terminated his compensation payments. Connor's testimony is a direct
16 admission of ALLMERICA'S intent to defraud DALESSIO.
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19 c. Connor had before her 75 statements limiting ALLMERICA'S authorization to
20 obtain and use information about DALESSIO. She deliberately ignored all 75 written
21 limitations, and fraudulently and unlawfully obtained his confidential OWCP file.
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24 d. ALLMERICA'S attorneys failed to comply with even the most rudimentary and
25 fundamental duties owed to an insured by an insurer; Their activities constituted an assault
26 against DALESSIO'S privacy, his own and his family's health and financial security, and his
27 very freedom.
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30 e. ALLMERICA repeatedly had sent investigators to trespass on DALESSIO'S
31 property and to spy on him.
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2 122. DALESSIO was able to see, for the first time, the pattern of harassment and
3 intimidation that ALLMERICA had engaged in from the time that DALESSIO first filed his
4 claim. The claims for relief in his Crosscomplaint related to the same transaction, issues and
5 occurrences as alleged in his initial Crosscomplaint. Much of the proof of his claim resided
6 in ALLMERICA'S previously incomprehensible files. ALLMERICA and SHANE had been
7 aware of these issues since the very beginning (1996) of this action, and had filed
8 ALLMERICA'S action in bad faith.
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12 JUDGE WALKER'S participation in ALLMERICA/SHANE'S scheme to defraud
13 DALESSIO included WALKER'S refusal to allow DALESSIO to file an amended
14 counterclaim. In September, 2001 DALESSIO submitted a Request for Leave to File an
15 Amended Counterclaim. DALESSIO had continuously worked on this document, without
16 interruption, to the extent that his health permitted, from the time that DALESSIO finished
17 phase one of his depositions of ALLMERICA witnesses. His Counterclaim primarily was
18 based upon ALLMERICA'S and SHANE'S violations of California law, its in-house
19 attorney's admission that ALLMERICA intended to commit fraud, and documents that
20 clearly showed that it (ALLMERICA) had acted in bad faith and invaded DALESSIO'S
21 privacy. The Amended Counterclaim was drafted and submitted as quickly as his health
22 permitted. ALLMERICA submitted no admissible evidence in opposition to his Motion.
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30 123 . DALESSIO filed his counterclaim promptly upon the discovery of this new
31 evidence. The pleadings were still open, as ALLMERICA had never answered his previous
32 Amended Counterclaim. No admissible evidence was before the Court in opposition to his
33 Request. JUDGE WALKER, however, allowed his bias and prejudice and his participation
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2 in ALLMERICA/SHANE'S fraud to overrule both the facts and the law. He refused to let
3 DALESSIO file an Amended Counterclaim
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5 124. JUDGE WALKER correctly found that that the Central District was the proper
6 venue for this action. Because of his bias and prejudice, and his participation in the
7 ALLMERICA/SHANE fraudulent scheme, he refused to transfer the case.
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10 The following facts dictated the requirement transfer this case:

11 a. The insurance policy, upon which this action is based, was purchased by
12 DALESSIO in the Central District of California. No operative facts pertaining to this action
13 occurred in the Northern District of California.
14

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16 b. ALLMERICA'S claim did not arise out of or have any connection with any
17 business transacted by DALESSIO in the Northern District. In good faith, DALESSIO
18 denied liability in this case. Discovery was just underway, so that transfer of this case would
19 have caused no substantial delay.
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21
22 c. DALESSIO was domiciled in the Central District from 1970 to 1994.
23 DALESSIO knew attorneys, researchers, statisticians and other support persons who would
24 assist DALESSIO in the preparation for and trial of this matter. Trial of this action in the
25 Northern District was excessively expensive for DALESSIO and excessively burdensome to
26 the necessary witnesses, when compared to a trial in the Central District.
27

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29 d. DALESSIO expected to call approximately 25 witnesses to his defense of
30 ALLMERICA'S action and the prosecution of his Counterclaim. Twenty-three of these
31 witnesses were within the range of legal process of the Central District. All of these
32 witnesses were beyond the reach of the Northern District. The distances that twenty three
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1 witnesses would have to travel to attend trial in the Northern District averaged
2 approximately 287 miles, as compared to attending trial in the Central District, where the
3 average distance was approximately 16 miles.
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6 125. DALESSIO informed JUDGE WALKER that justice would be promoted by
7 transferring this cause to the Central District. Necessary expenditures of time and resulting
8 burdens to the witnesses, most of whom are gainfully employed, would be far less if the case
9 in tried in the Central District. Such transfer also would greatly have increased his
10 opportunity to present witnesses whose testimony was essential to his defense.
11

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13 126. JUDGE WALKER opined that the proper venue for the case was in the Central
14 District. He refused, however, to transfer the case to its proper venue, because, he
15 speculated, ALLMERICA might want to move for a summary judgment. Apparently JUDGE
16 WALKER considered himself the only judge qualified to rule on such a motion.
17

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19 127. Ten months passed and ALLMERICA did not move for a summary judgment.
20 DALESSIO again asked the Court to move the case to its proper venue. DALESSIO pointed
21 out that ALLMERICA had gained enormous strategic advantage by the Court's delaying the
22 promised change of venue. His case preparation, including the taking of and representation
23 at depositions, had been set back by his inability to hire trial counsel and expert witnesses.
24 Moreover, his health had been negatively impacted, to the extent of multiple
25 hospitalizations, due, in large part to the stress of managing the case.
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28 128. In his Motion, DALESSIO reviewed, in summary form, reasons why
29 ALLMERICA could not possibly prevail on a Motion for Summary Judgment.
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32 ALLMERICA opposed DALESSIO'S assertions, but provided no evidence upon which it
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2 might base a summary judgment. DALESSIO contended that, unless it could prove fraud,
3 ALLMERICA'S action was barred by the Statute of Limitations, and by language in the
4 contract. DALESSIO believed, in good faith, that the evidence, all of which previously had
5 been provided to the Court, precluded any possibility that ALLMERICA could sustain a
6 summary judgment based upon fraud.
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10 129. JUDGE WALKER again ignored his request and waited another eight months
11 for ALLMERICA to file its Motion for Summary Judgment. As he had predicted, JUDGE
12 WALKER then ruled in ALLMERICA'S favor. His rulings cited the false facts set forth
13 above, and his refusal to recognize the true, unopposed and/or documented facts set forth
14 below. Realistically, JUDGE WALKER'S "invitation" to ALLMERICA to move for
15 summary judgment, and his granting of that motion based upon "facts" that existed only in
16 JUDGE WALKER'S mind were not the product of an independent, honest jurist.
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21 130. JUDGE WALKER'S rulings were sufficiently outrageous that they must have
22 been the products of a conspiracy to defraud DALESSIO.
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24 131. JUDGE WALKER incorrectly applied California law by finding that
25 California's Statutory Incontestable Clause did not prevent ALLMERICA from reducing or
26 denying DALESSIO'S claim. California Insurance Code, §10350.2 provides that every
27 individual disability policy issued in California is required to contain an Incontestable
28 Clause in a form determined by state law. An insurer issuing an individual disability policy
29 may select between two forms of an incontestable clause. ALLMERICA'S disability income
30 policy contained the following two separately identified paragraphs:
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2 (a) After this policy has been in force for two years during your lifetime (excluding
3 any period during which you are disabled), we will not be able to contest the statements you
4 made in the application.
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6 (b) We will not be able to reduce or deny any claim for disability which starts after
7 two years from the date of issue because the disease or physical condition existed before the
8 date of issue. There is one exception. We will be able to reduce or deny the claim if the
9 disease or physical condition is specifically excluded from coverage when the loss occurs.”
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11
12 132. In his opinion, JUDGE WALKER attempted to support ALLMERICA’S
13 shifting claim that the Incontestable Clause somehow had been tolled. His contortionist
14 efforts reveal the length to which he was willing to subvert justice. First, JUDGE WALKER
15 quoted and apparently considered only paragraph (a) Of the incontestable clause, and
16 ignored paragraph (b). This latter paragraph, which is not contingent on paragraph a,
17 contains no tolling clause. It requires that an insurer must specifically excluded a disease or
18 physical condition from coverage before it can deny a claim filed after two years from the
19 date of issue of the policy, because the disease or physical condition existed before the date
20 of issue.
21

22 133. DALESSIO’S claim for disability was filed after two years from the date of
23 issue of the policy. No disease or physical condition was specifically excluded from
24 coverage in the policy. Pursuant to paragraph (b) above, ALLMERICA was prohibited from
25 denying his claim because his disease or physical condition existed before the date of issue.
26 JUDGE WALKER chose to ignore this clear resolution of ALLMERICA’S action.
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2 134. JUDGE WALKER also incorrectly applied California law by finding that
3 California's Statutory Incontestable Clause paragraph (a) was tolled by a "residual
4 disability." He incorrectly applied California law when he placed the burden of proof on
5 DALESSIO to prove that the incontestable clause had not been tolled. It is uncontested that
6 Defendant did not make a claim on the policy until the two-year contestable period had
7 elapsed. DALESSIO, therefore, provided prime facie evidence that the policy was
8 incontestable. ALLMERICA asserted that the incontestable clause was tolled. The burden of
9 proof on this issue rested upon ALLMERICA, the party asserting the claim. JUDGE
10 WALKER instead placed the burden on DALESSIO.
11

12
13 135. In 1990, DALESSIO had advised ALLMERICA that the two-year contestable
14 period had run. ALLMERICA did not contest this fact. In 1993, DALESSIO told
15 ALLMERICA'S independent medical examiner that his memory problems, the cause of his
16 original disability dated from 1980, and that it might have been caused by tuberculosis or a
17 brain injury. ALLMERICA took no action after learning these facts. In 1996, ALLMERICA
18 first claimed that contestable period had been tolled. An independent jurist might have
19 considered that ALLMERICA was estopped from claiming that the incontestable clause was
20 tolled. JUDGE WALKER ignored this evidence.
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22
23 136. The Policy definition of "residual disability" required that a "sickness" cause the
24 insured's loss of earnings." "Sickness" was defined in the Policy as "... sickness or disease
25 which first manifests itself while this rider (the Lifetime Sickness Rider) is in force." Thus,
26 in order for an insured to be "residually disabled" he or she must suffer a "sickness" that first
27 manifests itself during the time that the Policy was in effect. ALLMERICA'S entire
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2 Complaint, however, was based upon its assertion that DALESSIO'S disabling sickness first
3 manifested itself before DALESSIO purchased the Policy. Therefore, DALESSIO could not
4 have been residually disabled, as that term is defined in the Policy, because his illness did
5 not first manifest itself during the contestable period.
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8 137. JUDGE WALKER, however, determined that the policy definition of
9 "sickness" did not apply to the Incontestable Clause. The Court claimed, without citation,
10 that the policy's Lifetime Sickness Rider (LSR) was "in force" only when an insured turned
11 65. No such limitation appeared in the Policy. Absent express language stating that the LSR
12 was not in force when the policy was issued, no reasonable person would conclude that the
13 LSR was not in force once the policy was issued by the insurer. At best, the language crafted
14 by ALLMERICA created an ambiguity. An impartial jurist would have followed both
15 California and Federal law and held the ambiguity against ALLMERICA. JUDGE
16 WALKER must have determined that the ambiguity was DALESSIO'S fault, even though
17 DALESSIO had no say in the drafting of the contract.
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24 138. JUDGE WALKER again incorrectly applied California law when it found that
25 his base income qualified DALESSIO as "residually disabled," as that term was defined in
26 the policy.
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28 a. The policy Rider for Residual Disability (RRD) defined "residual disability" to
29 mean, "... that although you are engaged in an occupation, injury or sickness causes you to
30 earn at least 20% less than your base earnings."
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33 b. Throughout the more than thousand pages of ALLMERICA'S files, there is not
34 one single reference to DALESSIO'S "base earnings," or one single reference to his being

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2 “residually disabled.” Presumably, since ALLMERICA knew that DALESSIO suffered from
3 some preexisting disability no later than 1993, when an ALLMERICA doctor reported this
4 fact to it, it would have calculated this figure and noted it in its files.
5

6 c. JUDGE WALKER, however, arrived at the bazaar conclusion that
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8 DALESSIO’S base income, as defined in the policy, was the income that he earned in 1980,
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10 eight years before he purchased the policy. This “interpretation” could not be sustained
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12 under California law, where any ambiguity in policy language is decided against the insurer.

13 d. DALESSIO provided conclusive evidence that he had received 1989 payments
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15 for legal services of over \$220,000 from just two of his clients. His earnings were greater
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17 than his entire Peace Corps salary for the period 1978 through 1980. JUDGE WALKER
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19 simply ignored these facts and found that DALESSIO’S earnings during the contestable
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21 period were less than his yearly 1978-1980 Peace Corps earnings.

22 139. In addition to ignoring his proven 1989 income, JUDGE WALKER determined
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24 that DALESSIO’S “income” did not include income from his real estate ventures. The
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26 policy contained no such limitation. JUDGE WALKER also determined that the definition
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28 of “occupation” contained in the Policy did not include DALESSIO’S pro bono legal
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30 services. No such limitations appeared in the Policy. JUDGE WALKER alone created these
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32 limitations, acts prohibited by California law.

33 140. Once JUDGE WALKER determined that DALESSIO had been disabled since
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1980, as that term is defined in the policy, he calculated DALESSIO’S base income from a
time eight years before DALESSIO purchased the policy. This too clever twisting of the
policy’s Rider for Residual Disability (RRD) provisions opened a Pandora’s Box of troubles.

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2 According to JUDGE WALKER'S interpretation of the policy, DALESSIO'S "index
3 month" would commence at some unidentified date in 1980. Pursuant to the policy after the
4 first year of disability, in DALESSIO'S case sometime in 1981, the definition of "base
5 earnings" would change to "base earnings will mean indexed base earnings." The purpose of
6 "indexed base earnings" was to increase yearly the benefit paid to an insured according to a
7 formula based upon the increase in the Consumer Price Index.
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11 141. The RRD further provides: "If you suffer residual disability, we will pay you a
12 monthly benefit. Benefits will start after the elimination period, or after total disability ends
13 if later." The Elimination Period is defined in the policy as: "...the number of days at the
14 beginning of each period of disability when you do not receive benefits." The elimination
15 period for DALESSIO'S policy was 60 days. According to JUDGE WALKER'S ruling,
16 DALESSIO was entitled to receive residual disability benefits from SMA for the period 60
17 days after an undetermined date in 1980 until September 1990.
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22 According to JUDGE WALKER'S interpretation of the RRD, SMA'S policy
23 committed it to pay residual disability benefits, increased by a formula based upon the
24 consumer price index times the number of years that an insured claimed that he or she was
25 residually disabled, *before he or she purchased the policy*. No insured believes that an
26 insurer would reach back to a time before a policy was purchased and pay him or her
27 benefits for a pre policy period. And no insurer would do so. As used in the RRD, "the date a
28 disability began" must commence after the policy date of issue.
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33 142. In doing the acts alleged herein, ALLMERICA, SHANE, SPARKMAN and
34 WALKER have acted with malice, oppression and fraud, and with the intent to harm

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DALESSIO and/or with willful and wanton disregard for the harm these acts would cause to DALESSIO. Because of this despicable conduct, DALESSIO seeks punitive damages in an amount sufficient to punish ALLMERICA, SHANE and WALKER and to serve as an example to others.

WHEREFORE, Defendant and Counterclaimant DALESSIO prays for judgment as follows:

On ALLMERICA'S complaint:

1. That Plaintiff CPE take nothing by way of its complaint;

On Counts One, Two, Three and Four of the Counterclaim

2. For actual damages in favor of DALESSIO and against SHANE, SPARKMAN and WALKER jointly and severally, in the amount of \$500,000 or according to proof at trial;

On Count Three of the Counterclaim:

3. For actual damages in an amount to be proved at trial, plus all other costs;

4. A preliminary and permanent injunction prohibiting ALLMERICA from prosecuting its claims in violation of the Settlement Agreement.

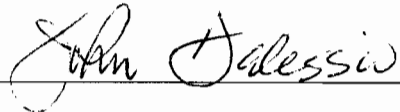
On Counts One, Two and Four,

5. For punitive damages against each of SHANE, SPARKMAN, WALKER and ALLMERICA in an amount sufficient to punish them for their wrongful acts and to serve as an example;

On all Counts

6. For interest on all judgment amounts at the legal rate;
7. For reasonable attorney's fees;
8. For DALESSIO'S costs of suit;
9. For such other and further relief as the Court deems proper.

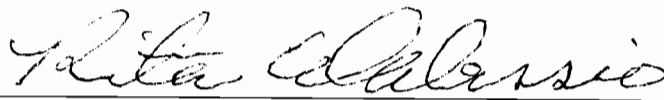
Dated: May 12, 2008



for Defendant and Counterclaimant, JOHN DALESSIO



for THE DALESSIO FAMILY (2003) TRUST



for Defendant and Counterclaimant, RITA DALESSIO